PAYNS BOAT WORKS (PVT) LTD
versus
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
AND NATIONAL HOUSING
and
CITY OF HARARE
and
YARNFIELD ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 March, 2018 & 15 May, 2018

Opposed Matter

M Chakandida & Advocate Damiso, for the applicants
F. Chingwere, for the 1st respondent
C Kwaramba, for the 2nd respondent
I Ndudzo, for the 3rd respondent

MANGOTA J: It is not the business of the court to compel parties to contract. Nor is it its duty to draw up a contract for them. The court's business is to ensure that parties who conclude a contract abide by its terms and conditions.

Where one party breaches the contract and the aggrieved party approaches the court for redress, the aggrieved party will, in all probability, receive the sympathy of the court. It will, in the mentioned regard, call upon the offending party to abide by the terms and conditions of the contract which it signed with the other.

A person who breaches a lease which he concluded with another cannot move the court, through the guise of a declarator, to compel the innocent party to observe the contract the terms of which he violated. Where he does so, the court will not take him seriously at all. It will, in all probability, regard his suit to fall into the realms of frivolity and vexatiousness.

The above cited paragraphs describe the circumstances of the applicant in a very graphic manner. The applicant is a legal entity. It alleges that it concluded a lease with the second respondent in 1964. It states that the first respondent under whose supervision the second respondent operates violated its contractual rights with the second respondent. The first

respondent, it alleges, directed the second respondent to rescind the decision which the latter made to maintain its contract with it. It moved the court to:

a) set aside the first respondent's rescission of the second respondent's resolution which the latter made in its favour;
b) declare as highly unprocedural and unlawful the manner in which the first and the second respondents handled its matter;
c) declare, as null and void, the lease agreement or proposed lease agreement between the second respondent and the third respondent or between the second respondent and any other person.

All the three respondents opposed the application. The first respondent is the Minister of Local Government, Public Works and National Housing ["the Minister"]. The second respondent, the City of Harare, is a statutory body. It operates under the supervision of the Minister. The third respondent was, at one time, a subtenant of the applicant. It is now the second respondent's tenant. It assumed that status when it signed the lease with the second respondent during the period April to May, 2017. It leased the second respondent's property which is known as L, N and P Old Petrol Site NO. 2 Market Street, Eastlea, Harare ["the property"].

The property is the applicant's cause of complaint. It states that it leased it from the second respondent from as far back as 1964. It insists that it should retain lease of the same.

The first respondent admits, in his opposition to the application, that he directed the second respondent to rescind its resolution of 19 December, 2016. He states that his direction was anchored upon the fact that it was against public interest for the second respondent to continue to lease the property to the applicant. He gives two reasons for his decision. There are that:

a) the applicant was not paying rent for its lease of the property - and
b) it was subletting a portion of the property without the authority of the second respondent.

He moved the court to dismiss the application with costs.

The second respondent admits that the applicant was its tenant for many years. It states that, on 19 December 2016, it resolved to maintain its lease with the applicant subject to the latter clearing all the outstanding rental arrears for the property within a specified period of time. It avers that the Minister rescinded the resolution. Its position is that, where the Minister

gives a directive as he did *in casu* in terms of section 314 of the Urban Councils Act [*Chapter 25:15*], it has no option but to comply with the same. It avers that, following the Minister's directive, it on 11 April 2017, rescinded the resolution to retain the applicant's tenancy. It says it complied with the law in every step of the way. The applicant, it argues, cannot impugne what has been done in terms of the law. It complains that the applicant was not a good and *bona fide* tenant. It says it perpetually breached the lease through its failure to pay rent as well as its illegal subletting of the property. It moved the court to dismiss the application with costs.

The third respondent's averments are that it was once a subtenant of the applicant at the property. The applicant misrepresented to it that it (i.e applicant) owned the property when it took the sublease from it. It eventually discovered that the applicant was not the owner of the property. The discovery occurred when its business at the property was being hindered because of the applicant's none payment of rent to the second respondent. It says it concluded a lease of the property with the second respondent and it is now the latter's new tenant. It insists that its lease with the second respondent is legal and harmonious. It avers that there was no lease which bound the second respondent when it leased the property to it. It moved the court to dismiss the application with costs which are on a punitive scale.

Applications, for a declarator are, as always, filed under section 14 of the High Court Act [*Chapter 7:06*]. The current application was, therefore, filed under the mentioned section. The section confers a discretion on the court to determine future or contingent rights. It reads:

> "The High Court may, in its discretion and at the instance of an interested person, inquire into and determine any existing future or contingent right or obligation ……" [emphasis added].

The question which falls for determination is whether or not the applicant has a right over the property of the second respondent. It states that it rented the second respondent's property from 1964. It states, further, that it made improvements on the same.

Evidence which is filed of record shows that it was the second respondent's tenant for many years. It also shows that it made some improvements on the property although the value of the same remains a disputed matter.

Annexure U which the applicant attached to the application shows that, until 11 April 2017, the applicant was the tenant of the second respondent. Reference is made in this regard to para 7 (2) of the annexure. It reads, in part, as follows:

> "… the lease agreement subsisting between Council and the Head Tenant (Boats and Paynes (Pvt) Ltd) in respect of site L. N and P Old Petrol Site in Eastlea be maintained subject to the

tenant clearing all the outstanding rental arrears for the property within specified period." [emphasis added].

Resolutions 1, 2, 3, 4 and 5 of the same Annexure constitute the second respondent's rescission of its resolution of 19 December 2016. They read, in the relevant parts, as follows:

RESOLVED

(1) That council notes the Ministerial Directive dated 15 March 2017 rescinding its Resolution (Item 26 of the 1860th Ordinary Council Minutes dated 19 December 2016 …… regarding the lease of Sites L, N and P Old Petrol Site in Eastlea to Paynes and Boats (Pvt) Ltd.

(2) That Council also notes that the Honourable Minister of Local Government, Public Works and National Housing has also directed that sites L, N and P Old Petrol Site be leased to the current tenants Yanfield Enterprises (Pvt) ltd.

(3) That, in view of resolutions (1) and (2) above, and in terms of s 314 (1) of the Urban Councils Act [*Chapter 29:15*] the resolutions recorded under Item 26 of the 1860th Ordinary Council Minutes dated 19 December 2016 (…) regarding the lease of sites L.N and P Old Petrol Site in Eastelea to Boats and Paynes (Pvt) Ltd be and are hereby rescinded.

(4) That in view of resolution (3) above, Sites L, N and P Old Petrol Site be leased to Yanfield Enterprises (Pvt) ltd for a period of five (5) years at an initial monthly rental of ($260.00) two hundred and sixty United States dollars and on terms and conditions applicable to such premises as were applicable to the former tenant…

(5) That any previous decision of Council inconsistent with the foregoing be and is hereby rescinded." [emphasis added]

Matters which relate to the abovementioned five (5) paras were deliberated by the second respondent at its 1862nd Ordinary Council Meeting of 11 April 2017. It was at that meeting that the applicant lost its tenancy of the property. The second respondent described it as its former tenant. Reference is made in this regard to resolution number 4 (*supra).*

It is evident that, as at the mentioned date, the applicant did not have any right – real or personal - in the property. It had lost the same. It is, therefore, not known how it insists on a declarator of a non-existent right.

Declarations are, in terms of section 14 of the High Court Act, only made where there are existing, future or contingent rights. They are not made where such are, as *in casu*, non-existent. Where the latter is the case, there is nothing for the court to declare, GUBBAY CJ clarified the stated position in a succinct manner in the case of *Johnson* v *ACF*, 1995 (1) ZLR 65 (H). The learned Chief Justice said:

> "the condition precedent to the grant of a declaration order is that applicant must be an interested person in the sense of having direct and substantive interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not ask hypothetical questions unrelated thereto." [emphasis added].

That the applicant fulfilled the above mentioned requirements prior to 11 April 2017 requires little, if any, debate. It had a direct and substantive interest in the subject matter of the suit. The interest related to a personal right which it could enforce against the second respondent. The latter's termination of the lease with it of 11 April 2017 took that personal right away from the applicant.

It follows, from the foregoing, that if the application had been filed before 11 April 2017, the applicant's case would not have been without merit. It would have shown that it had a personal right which it sought to enforce against the second respondent. The application which it filed on 12 May 2017 can be likened to the actions of a person who makes every effort to close the stables when the horses have already bolted. It is an exercise in futility which is not worthy the attention of anyone let alone that of the court.

Whether or not the first and the second respondents did not act in a professional manner depends on what each did. The applicant criticizes them for their conduct. It avers that the manner in which its case is being handled by the two respondents is highly unprocedural and unlawful. Reference is made in this regard to para 2 of its draft order.

The second respondent says it acted on the instructions of the first respondent. It states that it had no option but to comply with the Minister's directive. It avers that the law, as stated in the Urban Councils Act, did not give it a leeway to act otherwise.

The applicant's criticism of the second respondent is, in my view, misplaced. The second respondent was, on 19 December 2016, prepared to allow it to maintain the lease it held with it. It, in fact, made a resolution to the stated effect. It did so notwithstanding the fact that the applicant allowed it a substantial sum of money in arrear rentals. It only rescinded the same at the instance of the first respondent.

The second respondent cannot, under the stated circumstances, be said to have acted unprofessionally, unlawfully or unprocedurally. It acted procedurally in the sense that it took a decision to rescind its resolution of 19 December, 2016. It did so at its 1862nd Ordinary Council Meeting of 11 April, 2017. It also acted lawfully as s 314 (3) of the Urban Councils Act compelled it to comply with the decision of the Minister. It did nothing but to follow what the law dictated to it.

I reiterate that the second respondent did not have the option to go against the Minister's directive. Reference is made to s 314 (3) of the Urban Councils Act. It reads:

> "(3) The Council shall, with all due expedition, comply with any direction given to it in terms of subsection (1)."[emphasis added]

The subsection, it is evident, is peremptory. The second respondent complied with it to the letter and spirit. The applicant's criticism of its conduct it, therefore, unfounded.

The first respondent says he acted in terms of section 314 (1) of the Urban Councils Act [*Chapter 29:14*] ["the Act"]. The section confers a discretion upon him to reverse or rescind resolutions, decisions, etc of councils. It reads:

> "(i) Where the Minister if of the view that any resolution or action of council is not in the interests of the inhabitants of the council area concerned or is not in the national or public interest, the Minister may direct the council to reverse, suspended or rescind such resolution or decision or to reverse or suspend such action."[emphasis added].

It is the Minister's position that it was not in the interests of the inhabitants of the second respondent for the latter to continue to lease its property to the applicant. He says the continued lease of the same adversely affected the inhabitants of the second respondent because the applicant:

(i) was not paying rent to the second respondent as and when such fell due- and

(ii) was illegally subletting a portion of the property to the third respondent.

The letter which the Minister addressed to the second respondent appears at p 175 of the record. It reads, in part, as follows:

> "RESCISSION OF RESOLUTION
> Following a complaint received by this office, I have perused the process undertaken to deal with the lease for the old Petroleum site.
> As it is not in the public interest to continue leasing the site to an organisation that has considerable arrears and has illegally sublet the stand. I have, in terms of s 314 (1) of the Urban Councils Act, rescinded item 32 under the Finance and Development Committee adopted under Item 24 at the 1860th Full Council meeting of December 2016.

> In terms of sections 315 of the Urban Council Act, I hereby direct that the current tenants, Yarnfield Enterprises, Pvt, Ltd be granted the lease for the said site."[emphasis added].

It is clear that the Minister did not act from thin air. He received a complaint. He investigated the same. He established that the applicant had considerable rent arrears and was illegally subletting part of the property to the third respondent. He invoked the discretion which the law confers upon him and rescinded the second respondent's decision to continue to lease the property to the applicant. He remained of the correct view that the decision of the second respondent was not in the interests of the latter's inhabitants.

The Minister complied with the law to the letter and spirit. He wrote to the second respondent. He, to the stated extent, complied with s 314 (2) of the Act. He gave valid and cogent reasons for the decision which he took. He cannot, under the stated circumstances, be said to have acted unlawfully or unprocedurally as the applicant is persuading the court to believe.

The applicant is, in many respects, the author of its own downfall. It states, in the application, that it was in rent arrears to the tune of $5511. These ballooned to $10 422.18 as of 30 September, 2016. Reference is made in this regard to the last but one paragraph of the letter which its legal practitioners addressed to the Registrar of this court on 21 March, 2018.

The lease which the applicant attached to its letter of 21 March, 2018 is relevant. It offers some guide on how the applicant and the second respondent were to deal with the issue of rent between them. The lease was concluded between the parties in December, 1983.

Paragraph (3) as read with para (22) of the lease deals with the issue of rent. Paragraph (3) reads, in part, as follows:

> "THE RENT shall be ……made on the first day of each month during the continuance of this lease at the offices of the City Treasure in Harare.

Paragraph 22 reads:

> "IF THE LESSEE shall fail to pay rent on the due date or at the latest within ten days thereafter or if the lessee shall commit any other breach of the terms and conditions of this lease the Municipality shall have the right in its discretion summarily to terminate this lease and retake possession of the stand without payment of any compensation whatsoever and without prejudice to my (*sic*) claim which it may have against the lessee for rent already due or for any damages which it may suffer by reason of such breach or termination." [emphasis added].

It is evident, from the above cited paragraphs, that the applicant was enjoined to pay rent for the property to the second respondent on the first day of each month. It did not do so for a period which was in excess of over one whole, according to the second respondent. Its

lease could not continue to subsist. It was, therefore, out of the magnanimity of the second respondent, that the latter resolved to maintain the lease with it on 19 December, 2016. A *fortiori* when it did not clear its arrear rentals which accrued to an initial sum of $5511 which later increased to $10 422.18.

That the applicant's none payment of rent was prejudicial to the inhabitants of the second respondent requires no debate at all. The *res ipso liquitar* principle remains applicable in its case. The Minister's directive cannot, therefore, be said to have been made out of malice. It was properly made.

The applicant's statement which is to the effect that it verbally agreed with the second respondent to sublet a portion of the property to the third respondent and others raises more difficulties for it than it assists its case. A *fortiori* when the second respondent denies the existence of the alleged verbal agreement. The assertion raises a material dispute of fact which cannot be resolved on the papers which the parties placed before me.

It is trite that where a material dispute of fact exists, the court can either dismiss the application or refer the case to trial. It has a discretion to adopt the one or the other approach (see *Magurenje* v *Mapheba & Ors* 2005 (2) 44 (H)).

It is my view that the applicant was not candid with the court when it stated that it verbally agreed with the second respondent to sublet a portion of the property. My views find support from a reading of para 15 of the December 1983 lease which the applicant availed to me. It reads:

> "15. THE LESSEEE shall not cede, assign hypothecate or otherwise alienate this lease or its rights hereunder nor sublet the stand or any portion thereof for any purpose without the written consent of the Municipality first had and obtained and the Municipality may in its absolute discretion refuse to give such consent without assigning any reason for such refusal" (emphasis added).

The above as read with para 24 of the lease shows, in clear and categorical terms, that there could not ever have been a verbal variation of the lease. Paragraph 24 is explicit. It reads:

> "24. THIS AGREEMENT OF LEASE is the whole of the contract between the parties and no representations made by either party to the other shall have any force or effect unless included herein or shall any amendments be effective unless recorded in writing and duly executed by the parties as an amendment to this lease. Any waiver by the Municipality of any of its rights in terms of this lease or any consent given by the Municipality by virtue of this lease shall not be regarded as a variation of this lease but the same shall not be effective unless recorded in writing." (emphasis added).

The applicant and the second respondent, it is evident from the above stated guide,

intended to have written variations of the terms and conditions of their lease. The applicant violated the same when it sublet a portion of the property to the third respondent and others. It was for the mentioned reason, if for no other, that the Minister directed the second respondent to rescind its resolution of 19 December, 2016. The direction is above reproach. It was not made with any malice at all. It was made on the basis of fairness and equity.

The second respondent states, and I agree, that the applicant cannot seek to set aside a decision that was taken in terms of the law.

The applicant's assertions which are to the effect that the Minister violated the Administrative Justice Act and s 68 of the Constitution of Zimbabwe when he acted as he did is neither here nor there. The section under which he acted did not require him to hear its case. It, at any rate, was in complete violation of the lease. That lease has since been terminated.

The respondents disputed the value of the improvements which the applicant says it made at the property. The applicant, on its part, did not substantiate the figures which it alleges constitute the improvements it made. This is yet again another material dispute of fact which cannot resolved on the papers.

The lease which the second respondent concluded with the third respondent in April and May, 2017 is valid. It was entered when the second respondent had terminated its lease with the applicant. It cannot, therefore, be disturbed.

I have considered all the circumstances of this application. I am satisfied that the same is devoid of merit. It cannot stand. It is, accordingly, dismissed with costs.

Chakandida and Associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners
Mbidzo, Muchadehama & Associates, 2nd respondent's legal practitioners
Mutamangira & Associates, 3rd respondent's legal practitioners